IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT KOLAR, as representative of the Rite Aid Corporation Investment Opportunity Plan and its participants and beneficiaries	:	CIVIL ACTION
v.	:	
RITE AID CORPORATION et al.	:	NO. 01-1229

MEMORANDUM

Dalzell, J. March 11, 2003

In accordance with our duty under Fed. R. Civ. P. 23(e), we here consider the settlement of this ERISA class action involving the employee plans of Rite Aid Corporation.[1] This matter is distinct from the litigation that spawned the partial shareholder settlement we approved in In Re Rite Aid Corporation Securities Litigation, 146 F.Supp.2d 706 (E.D. Pa. 2001) ("Rite Aid Securities Case"). Although the Plans are members of the shareholder class covered by that partial settlement, the compromise we consider here is completely separate from the multidistrict litigation and derivative litigation we considered at length in 2001.

Specifically, this action, which was filed on March 15, 2001, was brought as a class action on behalf of participants and beneficiaries of three employee benefit plans of Rite Aid

[1]Throughout this Memorandum, our reference to the "Plans" are to the three Plans of which State Street Bank and Trust Company ("State Street") is independent named fiduciary, i.e., the Rite Aid 401(k) Employee Investment Opportunity Plan (now called the Rite Aid 401(k) Plan), the Rite Aid 401(k) Distribution Employees Savings Plan, and the Perry Distributors, Inc. 401(k) Plan.

Corporation. Plaintiff generally claims that Rite Aid and the individual defendants were fiduciaries of the Plans and that they violated their fiduciary duties under ERISA by imprudently permitting the Plans and their participants to invest in Rite Aid common stock when it was not a proper or suitable investment. Plaintiff also alleges that Rite Aid failed to disclose adequate information to Plan participants under which they could make informed investment decisions. Plaintiff specifically alleges that Rite Aid common stock became an imprudent investment on May 2, 1997 and remained so until November of 1999 when the Plans ceased purchasing Rite Aid stock as a result of certain accounting improprieties regarding Rite Aid coming to light. See Rite Aid Securities Case, 146 F.Supp.2d at 741, n.4, and the case cited therein, for a fuller description of this unusual accounting history.

On November 13, 2002, we preliminarily certified a settlement class consisting of:

> All persons who are or were participates in or beneficiaries of the Plans on whose accounts or in whose interest the Plans purchased and/or held Rite Aid stock any time between May 2, 1997 and the date of the execution of the Agreement, other than the Individual Defendants.

We preliminarily certified this class under Fed. R. Civ. P. 23(a) and (b)(1). It was, therefore, a non-opt-out class.

The Settlement

Commencing in January of 2002, after the parties had completed much of their investigation, we directed them to participate in a mediation before the Honorable Jacob P. Hart, Magistrate Judge of this Court. The mediation took over eight months, with the parties meeting on eight different occasions with Judge Hart. All parties agree that the settlement of this highly-complex matter was only reached because of the patience, stamina and creativity of Judge Hart.

In essential terms, the Stipulation and Agreement of Settlement (the "Settlement") provides that the defendants, and certain of their insurers, will contribute $10,760,000 in cash to a Settlement Fund. For the Plan year beginning January 1, 2002, Rite Aid changed the matching contributions that it contributes on behalf of participates in its 401(k) Plan. As part of the Settlement, Rite Aid has agreed that through December 31, 2006 it will not modify or amend the 401(k) Plan in a way that reduces the 2002 matching contribution formula. Based upon the information at hand, the parties estimate that matching contributions to the 401(k) Plan will exceed $25 million per year, for a total in excess of $125 million from 2002 through 2006. For those class members who remain participants in the 401(k) Plan and continue to contribute a portion of their pay to that Plan, it is estimated that in excess of $30 million will inure to their benefit.

Rite Aid also agrees that if its matching contributions for any calendar year from 2003 through 2006 are less than the matching contributions paid in 2002, Rite Aid will contribute to the 401(k) Plan an additional aggregate amount equal to the difference, not to exceed $1,750,000 for any year. All matching contributions payable under the Settlement will be fully vested at the time they are paid to the 401(k) Plan.

Rite Aid has also agreed to certain important structural changes in the administration of its employee benefit programs, to be effective no later than sixty days after the agreement becomes effective, and continuing at least through 2006. Among these structural changes would be Rite Aid's appointment of an institutional trustee and an administrative committee for the Plans, which shall include at least three Rite Aid senior management employees.

We received an expert report from Dr. Sophie M. Korczyk, a qualified economist who has evaluated the financial aspects of the Settlement. She opines that:

> [t]he estimated present value of the settlement to Class members is $67.76 million . . . Of this total, $10,76 million represents the Settlement Fund, and $57.0 million represents the estimated present value of the 'safe harbor' matching formula guarantee.

Rep. of Sophie M. Korczyk, Ph.D. at 3 (Jan. 14, 2003). As we credit the opinion of Dr. Korczyk, we will take $67.76 million as the present value of this ERISA Settlement.

We convened a hearing on March 7, 2003 to consider the fairness of the Settlement. Before turning to that subject, however, we must briefly consider the uncontroversial class action prerequisites. After we then consider whether to approve the Settlement, we will address the issues of counsel fees and the sought "incentive award" for class representative Robert Kolar.

Class Action Elements

As noted, on November 13, 2002, we preliminarily certified a Settlement Class under Fed. R. Civ. P. 23(a) and (b)(1). The threshold question before us is whether this action should, in fact, be maintainable as a class action, a matter easily disposed of.

The class defined above is unquestionably "so numerous that joinder of all members is impracticable." Rule 23(a)(1).[2] No less than 16,315 class members were identified to receive first class mail notice, see Decl. of Ronald S. Kravitz at ¶ 4

[2]The threshold prerequisites of Fed. R. Civ. P. 23(a) are:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(Mar. 4, 2003). This number is, by any measure, sufficiently numerous.

There are also obvious "questions of law or fact common to the class." These include whether the individual defendants violated their ERISA fiduciary duties by imprudently allowing the Plans to invest in Rite Aid stock after the company's accounting difficulties became apparent. They also include the common fact questions of precisely when Rite Aid stock became an improper investment for the Plans.

There is little doubt that Mr. Kolar's claims are in every respect typical of those of his fellow class members, and with the aid of the experienced ERISA counsel he has retained, Mr. Kolar has fairly and adequately protected the interests of the class in this matter.

Fed. R. Civ. P. 23(b)(1) provides:

> (b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a

> practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

It would seem that ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class. Palpably, "inconsistent or varying adjudications" would be intolerable for the employees of the same employee benefit plans. At the same time, one member's claim would indeed "as a practical matter be dispositive of the interests" of fellow members of those Plans. Thus, a (b)(1) class is a perfect vehicle for resolving complex ERISA issues such as those involved here. See, e.g., In Re IKON Office Solutions, Inc. Sec. Litig., 209 F.R.D. 94, 102 (E.D. Pa. 2002); Thomas v. Smithkline Beecham Corp., 201 F.R.D. 386, 397 (E.D. Pa. 2001).

We therefore have no hesitation in making permanent the preliminary certification we made on November 13, 2002.

Fairness Review

As noted earlier, the Settlement was the product of intensive mediation over eight months that Judge Hart so ably conducted. Indeed, the intimate involvement of Judge Hart in this protracted mediation provides a great deal of comfort at the threshold of our fairness consideration.

Similarly, we also take comfort from the fact that not one of the many thousands of class members has taken issue with the merits of this Settlement, even after over 16,000 received

first class mail notice about it. This is, it seems to us, not surprising given the backdrop of this Settlement. That is to say, even worse than the stock market as a whole, Rite Aid has been sailing on rough waters since the accounting disclosures that spawned this and the Securities Case, as witnessed by Rite Aid's continuing low stock price as reported on the New York Stock Exchange. A settlement of $67.76 million in such a context surely represents a welcome ray of sunshine to these Plan members, and so their support is unsurprising.

We also draw comfort from a third source, and that is from State Street Global Advisors, whose Vice-President, Kelly Driscoll, testified at the March 7 fairness hearing. State Street has recently served as the independent named fiduciary for the Plans, and in that capacity, as represented in Ms. Driscoll's January 16, 2003 letter to the Court, State Street was involved "up until and including the negotiations and execution of the stipulation and settlement agreement dated October 31, 2002." Thus, a highly sophisticated, fully independent institution was involved at every step of the way during this enormously complex negotiation, and helped bring it to the fruition it has now reached.

Under all of the circumstances, no reasonable person could come to any other conclusion than that this Settlement is fair to the class. Give the extraordinarily complex and difficult problems this ERISA litigation presents, a compromise that permits very significant value to be added to the Plans is

highly desirable for the class. A total settlement value of $67.76 million is hardly trivial, and the non-monetary structural aspects of the Settlement offer the Plan's members future assurance that their benefits will be better protected.

There is no point in belaboring the issue: The Settlement is in all respects fair, reasonable and in the best interest of class members. We will therefore approve it.

Counsel Fees

Class counsel have petitioned for $5,234,557.50 in fees, and for reimbursement of $159,059.77 in expenses. Again, there are unusual aspects that deserve mention.

State Street, as independent fiduciary, formally supports the fee request. In the January 16, 2003 letter from Ms. Driscoll on behalf of State Street, she stated that "[w]e have reviewed the fee request and have determined it is reasonable." Ms. Driscoll confirmed this conclusion in her testimony before us on March 7.

State Street's view is unsurprising in view of the fact that it negotiated the fee agreement with class counsel. That agreement is, without question, arm's-length, given State Street's sophistication.

Pursuant to the fee agreement, the fee request excludes all hours required to prepare the fee petition. It also limits the 2.5 multiplier only to those hours incurred before November

13, 2002, when we preliminarily approved the Settlement and thereby removed the contingent aspects for plaintiff's counsel.

As this is a common fund settlement, it seems to us reasonable to apply the percentage approach that we did in In Re U.S. Bioscience Securities Litigation, 155 F.R.D. 116 (E.D. Pa. 1994). We will not repeat the analysis we made of percentage of recovery approaches at id. 117-120. We note, however, that instead of appointing the Special Master as we did in U.S. Bioscience, we had an at least equally effective surrogate in the person of State Street.

Since we wrote U.S. Bioscience, our Court of Appeals has formally approved attorney fee awards using the percentage of recovery approach. See In re: Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions, 148 F.3d 283, 333-34 (3d Cir. 1998); and In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 820-22 (3d Cir. 1995). We also had occasion to apply the percentage of recovery approach in the Rite Aid Securities Case, supra, 146 F.Supp.2d at 734-36, where we awarded a twenty-five percent percentage in that $193 million partial settlement.

It will be seen that the fee request here constitutes only 7.725% of the common fund. This is manifestly the result of the fee agreement that State Street negotiated here. We should also note that State Street's officer, Ms. Driscoll, confirmed for us on March 7 that State Street had reviewed and approved the time records and hourly rates that constituted the lodestar subject to the 2.5 multiplier. Indeed, even after the Settlement

was reached, State Street again, with the assistance of separate outside counsel, determined that the product of the fee agreements remained in all respects reasonable. In short, State Street's marketplace fee agreement has assured a reasonable fee in this case, and we therefore have no difficulty approving it for that reason alone.

Applying our Court of Appeals's Gunter factors, see Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 194-95 (3d Cir. 2000),[3] we find that a class in excess of 16,000 will unquestionably benefit from this $67.76 million Settlement. All class members will share in the cash component of the Settlement and about 7,400 will share in the benefits of the enhanced matching contribution.

Of the thousands of class notices sent by first class mail, only one class member has taken issue with the amount of the fee request. That objector's basis for questioning the fee

---

[3]The seven Gunter factors are:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

These factors, in turn, derive from the analysis in Prudential and GMC Pick-Up Truck, cited earlier in our text. See Prudential, supra, 148 F.3d at 336-40.

request was that the 2.5 multiplier was too high and that only 1.5 is warranted. Given the fact that the multiple was the product of State Street's sophisticated, arm's-length, negotiation, the objection is not well-taken. Indeed, in producing a percentage of recovery of 7.725%, the fee involves a recovery just over thirty percent of the proportion we approved from the common fund in the Rite Aid Securities Case.

It is quite evident that class counsel here were highly skilled and experienced in ERISA and complex class action litigation. Given this level of experience, as well as the complexity and difficulty of the case that required lawyers of such seasoning, the third and fourth Gunter factors are easily satisfied. We pause to note that some of the issues involved in this case, such as Rite Aid's failure to file an SEC Form S-8, were unprecedented; this reality illustrates not only the difficulty of the case, but the need for counsel of the highest caliber.

Given Rite Aid's current financial condition and huge debt load, the risk of non-payment here was, to say the least, considerable. One has only to look at Rite Aid's reported stock price on the New York Stock Exchange to gauge the level of financial challenges facing the company. Under these circumstances, the decision of plaintiff's counsel to settle -- and do so with a significant infusion of cash -- was prudent.

Over the past two years, plaintiff's counsel incurred over fifty-four hundred hours working on this case. Though the

parties did not engage in formal discovery, there was at our urging extensive investigation of the thicket of evidence in this matter. There were also a number of marathon mediation sessions. Counsel's time was well and necessarily spent.

Lastly, in looking at the awards in similar cases, we turn first to the Rite Aid Securities Case, where we approved a twenty-five percent recovery that amounted to a lodestar multiplier in excess of 4.5. We there had the benefit of Professor John C. Coffee's research in which he had compared hundreds of class action settlement recoveries and found a range of 18% to 37% in settlements over $52 million but below $100 million. See Rite Aid Securities Case, 146 F.Supp.2d at 735.

The fee request is, therefore, in all respects reasonable, and we approve it.

We turn only briefly to the request for reimbursement of costs and expenses. It is well-settled that such costs and expenses are recoverable, see Missouri v. Jenkins, 491 U.S. 274, 284 (1989). Reviewing the expense summary attached as Exhibit 8 to the petition, these sums were reasonable for a complex matter that has been pending for as long as this one. We therefore have no hesitation in approving reimbursement of $159,059.77.

"Incentive Award"

Mr. Kolar has sought $10,000 as a so-called "incentive award" for his service as class representative. In our opinion

in U.S. Bioscience, supra, 155 F.R.D. at 120-22, we explained why we agreed with Judge Posner that:

> If you dive into a lake and save a drowning person, you are entitled to no fee. The named plaintiff is not a professional; he is, at most, a public-spirited member of the class.

In the matter of Continental Illinois Securities Litig., 962 F.2d 566, 571 (7th Cir. 1992).

Drawing guidance from Congress's appraisal of lay litigation service in the form of jury fees, see 28 U.S.C. § 1871(b)(1), we decided in U.S. Bioscience to award $250.00 per day for lay representatives who subjected themselves to depositions. Taking account of the 23.2% increase in the Consumer Price Index from June of 1994 until now,[4] that daily rate would today, rounded, be $300.00.

As Mr. Kolar worked as the only class representative, it seems fair to give him the sum we awarded in U.S. Bioscience, adjusted for inflation. Even though Mr. Kolar did not subject himself to a deposition, all of the burden representing his fellow Rite Aid employees fell upon him. Mr. Kolar advised us on March 7 that he had spent about one hundred hours working with the attorneys over the past two years, which is the equivalent of

---

[4]The Bureau of Labor Statistics' most recent Consumer Price Index -- All Urban Consumers Not Seasonally Adjusted -- U.S. City Average All Items (1982-84=100) was 181.7. The Index for May, 1994 was 147.5, and therefore the increase was 23.2%. See http://inflationdata.com/id/HistoricalCPI.aspx and http://www.bls.gov/news.release/cpi.nr0.htm.

twelve and a half work days. At $300.00 per day, we will award Mr. Kolar $3,750.00 to reimburse his time and effort.

We attach an Order embodying the foregoing rulings.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT KOLAR, as representative of the Rite Aid Corporation Investment Opportunity Plan and its participants and beneficiaries	:	CIVIL ACTION
v.	:	
RITE AID CORPORATION et al.	:	NO. 01-1229

ORDER AND FINAL JUDGMENT

AND NOW, this 11th day of March, 2003, upon consideration of the motion of plaintiff for approval of the settlement (docket no. 42), and plaintiff's counsel's petition for attorneys' fees and reimbursement of expenses (docket no.

47), and after a hearing on March 7, 2003, and for the reasons stated in the foregoing Memorandum, it is hereby ORDERED that:

1. The motion and petition are GRANTED;

2. The Settlement[5] is APPROVED, and the parties to the Settlement are AUTHORIZED AND DIRECTED to consummate the Settlement and to carry it out in accordance to its terms;

3. The First Amended Complaint is DISMISSED WITH PREJUDICE, without costs;

4. Plaintiff, State Street, the Plans and each of the members of the class, and all persons claiming by or through them, are hereby PERMANENTLY BARRED AND ENJOINED from instituting, commencing and/or prosecuting, directly or indirectly, any and all Settled Claims against any and all of the Released Parties. The Settlement Claims are compromised, settled, released, remised, discharged and dismissed as against the Released Parties on the merits and with prejudice in accordance with the terms of the Agreement by operation of such Agreement and this Order;

5. Neither this Order, the Agreement, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

---

[5]As used herein, capitalized terms take the same meanings given them in the October 31, 2002 Stipulation and Agreement of Settlement (the "Agreement") unless we have defined it otherwise in our Memorandum.

(a) offered or received against the defendants or against the plaintiff or the class as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of the defendants or by plaintiff or the class with respect to the truth of any fact alleged by plaintiffs or the validity of any claim that had been or could have been asserted in this action, or the deficiency of any defense that has been or could have been asserted in this action, or of any liability, negligence, fault or wrongdoing of defendants;

(b) offered or received against the defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any defendant, or against plaintiff and the class as evidence of any infirmity in the claims of plaintiff and the class;

(c) offered or received against the defendants or against plaintiff or the class as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the parties to the Agreement, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Agreement;

(d) construed against the defendants or plaintiff and the class as an admission or concession that the

consideration to be given under the Agreement represents the amount that could be or would have been recovered after trial; or

(e) construed as or received in evidence as an admission, concession or presumption against plaintiff or the class that any of their claims are without merit or that damages would not have exceeded the Settlement Fund;

6. The Plan of Allocation is APPROVED as fair and reasonable, and plaintiff's counsel and the claims administrator are DIRECTED to administer the Settlement Fund in accordance therewith;

7. The firm of Liner, Yankelevitz Sunshine & Regenstreif LLP, as agent for plaintiff firms, is AWARDED $5,234,557.50 in fees, and $159,059.77 in reimbursed expenses, to be paid out of the Settlement Fund only after the Effective Date as provided in the Settlement Agreement;

8. The application of Robert Kolar for an award of an incentive fee is GRANTED IN PART and DENIED IN PART in that he is AWARDED $3,750.00, which shall be paid out of the Settlement Fund and only after the Effective Date;

9. The Court RETAINS jurisdiction over this action, and the parties to it, as well as over State Street, the Plans and each of the class members for all matters relating to this action, the Settlement and the Settlement Agreement including, (without limitation) all matters relating to the administration, interpretation, effectuation and/or investment of the Agreement and this Order; and

10. There is no just reason for delay in entry of this Order, and the Clerk is DIRECTED to enter this Order as a Final Judgment pursuant to Fed. R. Civ. P. 58.

BY THE COURT:

_____
Stewart Dalzell, J.